***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-1273

*To be argued by*
STEVEN A. SCHATTEN

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75-1273**

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

LEON ROGERS,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA

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## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

Leon Rogers appeals from a judgment of conviction entered on July 14, 1975, after a four-day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Superseding Indictment 75 Cr. 402, filed on April 17, 1975, in five counts, charged in Count One that Rogers conspired with defendants Charles Copper, a/k/a "C.J.," Michael Marciano, Thomas Carroll, Vincent McCluskey *

* Co-defendant Marciano went to trial with Rogers, was convicted on all counts in which he was named, and had his appeal dismissed by the Court for failure to file a brief. *United States* v. *Marciano*, Dkt. No. 75-1273, Order filed October 2, 1975. Copper entered a plea of guilty to the conspiracy count, testified at trial, and received a six-month jail sentence. Co-defe dants Carroll and

[Footnote continued on following page]

and others known and unknown, to hijack trucks carrying goods valued at greater than $100, in violation of Title 18, United States Code, Section 371. Count Four charged that Rogers, on January 22, 1973, hijacked a Connecticut Seafood Transport ("Connecticut Seafood") motor truck carrying frozen seafood valued at greater than $100, in violation of Title 18, United States Code, Sections 659 and 2.*

Trial commenced on May 27, 1975 and ended on May 30, 1975 with the jury returning a guilty verdict on both counts. On July 14, 1975, Judge Bonsal sentenced Rogers to concurrent terms of three years' imprisonment on each count.

Rogers has been continued on bail during the pendency of his appeal.

## Statement of Facts

### The Government's Case

Through the testimony of eight witnesses, including co-conspirators Carlton Boyd and James Dixon and co-defendant Charles Copper, the Government established that, beginning in October or November of 1972 (Tr. 242), Rogers, Boyd, Dixon and Copper discussed the hijacking of motor trucks on several occasions.** Their discussions

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McCluskey, who are not unknown to this Court, *United States* v. *Carroll*, 510 F.2d 507 (2d Cir. 1975), had their cases severed prior to trial. Subsequent to the conviction herein, an order of *nolle prosequi* was entered as to Carroll and McCluskey in view of the life sentences that they are serving.

* Rogers was not named in Counts Two, Three and Five of the Superseding Indictment.

** The statement in Rogers' Brief (at 4) that the evidence at trial showed that Rogers had joined the conspiracy after the December 15, 1972 Arrow Transportation hijacking is thus incorrect.

concerned the hijacking of two tractor-trailer loads of cigarettes (Tr. 243) and the hijacking of lobster and shrimp trucks. (Tr. 76, 262). During the same period, Rogers, Boyd, Dixon and Copper went out three times in Rogers' 1970 red Chevelle automobile to look for trucks to hijack (Tr. 244, 262, 263), and met with co-defendants Michael Marciano and Thomas Carroll in the Two Guys Bar in Secaucus, New Jersey (Tr. 74-76, 162-64) to discuss the delivery of stolen goods and payment of the hijackers. (Tr. 76-78). In connection with both hijackings, Marciano, Carroll and McCluskey were the fences for the stolen goods. The hijackers kept in contact with the fences (i) by meetings at the Two Guys Bar, and (ii) by telephone calls from the hijackers to the fences who were at the Two Guys Bar.

On December 15, 1972, Boyd, Dixon and Copper hijacked at gunpoint an Arrow Transportation Company motor truck which was travelling from New York City to Pawtucket, Rhode Island and carrying canned hams valued at approximately $45,000. (Tr. 69, 79-81).

The Arrow Transportation Company's freight bill (GX 1) was introduced without objection (Tr. 66) and shows that the truck was loaded with approximately 50,474 pounds of canned hams. Boyd, Dixon and Copper received approximately $3,600 from the fences for this hijacking job. (Tr. 256-58).

Between approximately January 2, 1973 and January 22, 1973, Rogers, Boyd and Dixon went out looking every business day for a load of shrimp and lobster. (Tr. 86-87). On about fifteen occasions, they scouted the Merchants Refrigeration Company at 17th Street and Tenth Avenue in New York City. (Tr. 87).

On January 22, 1973, Rogers, Boyd and Dixon hijacked at gunpoint a Connecticut Seafood motor truck driven by Alfred Wade, Jr. which was filled with approximately 30,000 to 40,000 pounds of lobster tails, shrimp and other frozen fish. (Tr. 39, 45). Rogers, who was armed (Tr. 88a), had brought his 1970 red Chevelle for use in the hijacking. (Tr. 88-89). The truck, laden with lobster tails, shrimp and other frozen fish, was taken from outside of the Merchants Refrigeration Company on 17th Street and Tenth Avenue in New York City. Wade had picked up the shipment at Merchants Refrigeration for transportation to Connecticut. (Tr. 40). After taking Wade's truck, the hijackers drove him and the hijacked truck to New Jersey. They delivered the truck to their fences and then drove Wade to New York in Rogers' red Chevelle, dropping him off in the Bronx. (Tr. 89-91).

A few days later, Rogers, Boyd and Dixon received approximately $5,000 for their efforts. (Tr. 91-92). The three hijackers then divided the $5,000 among themselves. (Tr. 92).

As part of its case, the Government offered various bills of lading (GX 4) with respect to the shipment of lobster tails, shrimp and other frozen fish that had been hijacked on January 22, 1973. These bills, received in evidence without objection, listed the types and quantities of frozen fish contained in the shipment. (Tr. 43-44). In addition, the Government offered a number of invoices (GX 5) sent to Connecticut Seafood, the trucking company, which related to this same shipment and which indicated that the value of the shipment greatly exceeded $100. (Tr. 45, 49).

Wade, the hijacked driver, testified that both the bills of lading and the invoices were kept by his company in the regular course of business. (Tr. 43-44, 45-46). The bills of lading were received in evidence without

objection; the invoices were received over objection. (Tr. 44, 48). Rogers' counsel inquired as to the value of the frozen fish shipment during the cross-examination of Wade. (Tr. 51-52). On redirect, Wade, who had been with Connecticut Seafood for 18 years (Tr. 38) and who had checked the shipment "piece-by-piece" (Tr. 51), testified that the 30,000 to 40,000 pounds of frozen fish had a value greatly in excess of $1,000. (Tr. 59).

## The Defense Case

Rogers took the stand and denied that he had participated in either of the hijackings. (Tr. 307). He testified that he had only met Boyd, Dixon and Copper occasionally in the afternoon and had drinks with them at a bar where truck drivers would gather. (Tr. 309-10). Rogers also denied that he had met with Boyd and Dixon on January 23, 1973, just one day after the Connecticut Seafood hijacking. (Tr. 320). However, when confronted with his testimony at another trial, *United States* v. *Leon Rogers*, 73 Cr. 1069, he recanted his testimony and admitted to spending the entire day and evening of January 23, 1973 drinking with Boyd and Dixon at the Two Guys Bar in Secaucus, New Jersey (Tr. 322-24), the bar out of which the fences had operated.*

During summation, Rogers' counsel never even attempted to argue to the jury that the Government had failed to establish that the value of the seafood shipment exceeded $100. (Tr. 438-52).**

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* Co-defendant Marciano also testified in an effort to exculpate himself, but his self-serving story was likewise rejected by the jury. Marciano also called a character witness in his behalf.

** Title 18, United States Code, Section 659, provides that where the value of the goods does not exceed $100, imprisonment may not exceed one year. If the value exceeds $100, imprisonment may not exceed 10 years. Accordingly, the Government was required to prove beyond a reasonable doubt, as an element of the crime charged, that the value of the goods exceeded $100. *Robinson*

[Footnote continued on following page]

# ARGUMENT

## POINT I

### The invoices submitted to Connecticut Seafood were properly admitted and were cumulative of overwhelming evidence demonstrating that both hijackings involved trucks carrying goods valued at many thousands of dollars.

Rogers argues that the invoices (GX 5), submitted to Connecticut Seafood, in connection with certain items included in the shipment of 30,000 to 40,000 pounds of lobster tails, shrimp and other frozen fish hijacked by Rogers, Boyd and Dixon on January 22, 1973, were the only evidence of the value of the shipment and were improperly admitted to demonstrate that the goods in question carried a value greater than $100. (Appellant's Brief at 6-9). This argument is utterly frivolous.

Rogers incorrectly claims that the invoices sent to Connecticut Seafood (GX 5) constitute the only evidence of the value of the shipment of lobster tails, shrimp and other frozen fish. (Appellant's Brief at 4). There is no dispute that Wade's Connecticut Seafood truck, hijacked by Rogers, Boyd and Dixon on January 22, 1973, was carrying 30,000 to 40,000 pounds of lobster tails, shrimp and other frozen fish. Nor is there any dispute about the fact that, in January 1973, the three hijackers received $5,000 from their fences for the hijacked load. Finally, no claim is raised here about Wade's testimony that the 30,000 to 40,000 pounds of lobster tails, shrimp and other

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v. *United States*, 333 F.2d 323, 326 (8th Cir. 1964). See, *e.g.*, *United States* v. *Tyers*, 487 F.2d 828 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974). Title 18, United States Code, Section 641, defines "value" as "face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

frozen fish had a value greatly in excess of $1,000. (Tr. 59).

The jury, using nothing more than their common experience as consumers, surely inferred that the 30,000 to 40,000 pounds of lobster tails, shrimp and other frozen fish had a value which dwarfed the minimal $100 requirement. Common sense no doubt also led the jury to conclude that no fence would pay hijackers $5,000 for a shipment worth less than $100. Finally, Wade testified that the value of the shipment greatly exceeded $1,000, and this testimony went uncontradicted. (Tr. 59).

Ignoring entirely the plethora of additional evidence upon which the jury undoubtedly relied in determining the value of this seafood shipment, Rogers raises the erroneous contention that the jury necessarily determined the issue of value by relying solely on the invoices. In any event, there was no error below, since the invoices were properly admitted into evidence.

Had the Government been seeking to establish the full value of the 30,000 to 40,000 pounds of frozen fish, it would have been preferable to call the various shippers in order to lay the foundation for the introduction of the invoices as business records. *United States* v. *Rosenstein*, 474 F.2d 705 (2d Cir. 1973); *United States* v. *Dawson*, 400 F.2d 194, 198-99 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969). Here, however, the Government sought to introduce the invoices for the very limited purpose of establishing the virtually indisputable proposition that the 15 to 20 tons of frozen fish, some of which were referred to in the previously admitted bills of lading (GX 4), were worth more than $100. There was no dispute that the invoices had been received by Connecticut Seafood in conjunction with the January 22, 1973 shipment. Nor was any claim raised to suggest that these invoices were con-

trived or in any way fraudulent. Indeed, there is nothing whatever to challenge or in any way dispute the trustworthiness of the invoices. In these circumstances, the District Court surely did not abuse its discretion in admitting the invoices into evidence to establish the very limited proposition that the frozen fish shipment had a value in excess of $100. *Cf. United States* v. *Leal*, 509 F.2d 122, 127-128 (9th Cir. 1975); Rule 803(24) of the Federal Rules of Evidence. In any event, as previously set forth, the invoices were merely cumulative of overwhelming proof that the seafood shipment had a value far in excess of $100. See *United States* v. *Rosenstein, supra*, 474 F.2d at 714; *United States* v. *Dawson, supra*, 400 F.2d at 199; *United States* v. *Schabert*, 362 F.2d 369, 371-72 (2d Cir.), *cert. denied*, 385 U.S. 919 (1966).

## POINT II

### The trial judge's instructions on the element of value were clearly proper.

Rogers claims that Judge Bonsal's instruction to the jury on the element of value was erroneous. Indeed, Rogers goes so far as to argue that "[u]nder the facts herein there was a serious issue as to whether the Government proved beyond a reasonable doubt that the value of the goods exceeded $100," and he claims that "[t]he Court's charge on that element left the jury no issue to decide." (Appellant's Brief at 11). These contentions are without merit.

In his instructions with respect to Count Four, relating to the hijacking of the Connecticut Seafood truck carrying 30,000 to 40,000 pounds of frozen seafood, Judge Bonsal instructed the jury that (Tr. 493):

> "The second element which the Government must prove is that the value of the fish was greater

> than a hundred dollars. That is, the contents of the truck. Well, there was a certain amount of evidence on that. As I recall it, these were pretty big trucks, and I think you can probably pretty much use your common sense on that and determine on the evidence whether they were worth more than a hundred dollars. I would assume so; I don't know, but I would assume so myself."

In his instructions with respect to Count Two, which did not name Rogers and which related to the hijacking of the Arrow Transportation truck carrying canned hams valued at approximately $45,000, Judge Bonsal stated (Tr. 497):

> "The second element is the value of the goods was greater than $100. Well, I think we had some testimony on that, I talked about that. I don't think that there is a serious question about that element."

The right of the District Court to summarize and comment on the evidence in his instructions to the jury is well-settled in this Circuit.* *United States* v. *Tramunti*, 513 F.2d 1087, 1120 (2d Cir. 1975); *United States* v. *DeLaMotte*, 434 F.2d 289, 291-92 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *United States* v. *Tourine*,

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* Although the Federal Rules of Evidence had not yet become effective at the time of trial of this case, Rule 201(g) of the Federal Rules of Evidence is noteworthy:

> "(g) Instructing jury . . . . In a criminal case, the Court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."

If this rule had been in effect, the Court could have taken judicial notice of the fact that 30,000 to 40,000 pounds of lobster tails, shrimp and other frozen fish are valued in excess of $100. The Court could have so instructed the jury since this is surely a fact "outside the area of reasonable controversy." *See* Notes of Advisory Committee on Proposed Rule 201, Note to Subdivision (a).

428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *United States* v. *Kahaner*, 317 F.2d 459, 479 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). The function of such comment is "to assist the jury in winnowing out the truth from the mass of evidence, much of it conflicting, and perhaps placed out of focus by different claims concerning its meaning and interpretation by the arguments of the parties." *United States* v. *Tourine, supra.*

The test of whether a judge's summary of the evidence is fair must be judged "*in the context of the whole trial record, particularly the evidence and arguments of the parties.*" *United States* v. *DeAngelis*, 490 F.2d 1004, 1009 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974) (emphasis added). *See also United States* v. *Tourine, supra.* Such an analysis in the instant case compels the conclusion that the trial judge's comments were fair and appropriate, particularly since Rogers' counsel never even argued to the jury any lack of evidence with respect to the value of the shipments which were hijacked, and since the Government established beyond any doubt whatever that the value of the Arrow Transportation ham shipment and the Connecticut Seafood shipment each ran into thousands of dollars.

It is also clear that the trial judge did not preempt the jury on the issue of value. The Court stated that it was the Government's duty to establish the value. The jury was properly instructed that their common sense and the evidence were to be determinative.

Moreover, when the Court asked for objections after its charge, Rogers' counsel raised none and stated that the Court had covered "every conceivable point." (Tr. 510). Failure to raise this issue prior to the jury's deliberations precludes Rogers from assigning it as error on appeal. F.R. Cr. P. 30.

## CONCLUSION

**The judgment of conviction should be affirmed.***

Respectfully submitted,

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*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

STEVEN A. SCHATTEN,
LAWRENCE B. PEDOWITZ,
*Assistant United States Attorneys, Of Counsel.*

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* Even assuming *arguendo*—and contrary to the position taken in this brief—that the Government somehow failed to establish the element of value with respect to the January 1973 seafood shipment or that the trial judge's instructions usurped the function of the jury, there is no dispute whatever that the Arrow Transportation truck taken on December 15, 1972 was carrying some 50,000 pounds of canned hams valued at approximately $45,000. Therefore, even if the Court should accept either or both of Rogers' contentions, his conviction on Count One, the conspiracy count, should nevertheless be affirmed, in view of the fact that he joined the hijacking conspiracy prior to December 15, 1972. *Supra*, at 2-3. *See United States* v. *Ferrara*, 451 F.2d 91, 97 (2d Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972); *United States* v. *Adcock*, 447 F.2d 1337, 1339 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971).

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK )
COUNTY OF NEW YORK) ss.:

STEVEN A. SCHATTEN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of October, 1975 he served a copy of the within Brief for the United States of America by placing the same in a properly postpaid franked envelope addressed:

Thomas J. O'Brien, Esq.
2 Pennsylvania Plaza
New York, New York 10001

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing in front of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Steven A. Schatten

STEVEN A. SCHATTEN
Assistant United States Attorney

Sworn to before me this

20th day of October, 1975.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977